VERNON STUART COUCH

(b)(6) [redacted]

LEGAL EXPERIENCE

2010-Present **Charlotte Immigration Court** **Charlotte, NC**

United States Immigration Judge

- Conduct removal or deportation proceedings on behalf of the Executive Office for Immigration Review, U.S. Department of Justice, for all immigration cases within North and South Carolina. Appointed by the United States Attorney General.
- Adjudicate claims for asylum, cancellation of removal, adjustment of status, and other relief under the Immigration and Nationality Act, 8 U.S.C. § 1101, *et. seq.*

2009-2010 **Poyner Spruill, LLP** **Charlotte, NC**

Of Counsel

- Member of regional law firm litigation practice specializing in professional liability defense, white-collar criminal defense, government and corporate investigations, and appellate law.

2006-2009 **U.S. Navy-Marine Corps Court of Criminal Appeals** **Washington D.C.**

Senior Appellate Judge

- Senior Judge of three-judge panel responsible for mandatory review of all courts-martial of members of the Naval Service pursuant to Articles 62, 66, 69, and 73 of the Uniform Code of Military Justice, and review of all petitions for extraordinary relief. Appointed by the Judge Advocate General, U.S. Navy.
- Senior Judge of national security panel to review cases involving classified information and espionage.
- Awarded the Legion of Merit upon retirement from active duty as Lieutenant Colonel, U.S. Marine Corps.

2003-2006 **Office of Military Commissions** **Washington D.C.**

Senior Prosecutor

- Prepared prosecution cases of alleged al Qaeda planners and financiers for the first trials by military commission since World War II.
- Lead counsel in *United States v. Hamdan*, involving an alleged bodyguard and personal driver of Usama bin Laden and other al Qaeda operatives. Assisted Department of Justice and Solicitor General in U.S. Supreme Court litigation of *Hamdan v. Rumsfeld,* 548 U.S. 557, 126 S. Ct. 2749 (2006), a landmark case regarding separation of powers and Presidential authority during wartime.
- Coordinated with the Criminal Investigation Task Force (CITF), FBI, Department of Justice, National Geospatial-Intelligence Agency, Office of Naval Intelligence, and other government agencies to prepare prosecution cases of detainees held in the Global War on Terrorism. Traveled to Guantánamo Bay, Qatar, Afghanistan, and Pakistan.
- Served as liaison to the Central Intelligence Agency.

2001-2003 **Legal Service Support Section, 2d FSSG** **Camp Lejeune, NC**

Military Justice Officer/Chief Trial Counsel

- Returned to active duty in August 2001 to assist in the prosecution efforts related to an investigation of the MV-22 Osprey aircraft program. Mobilized for active duty after the September 11, 2001 attacks against the United States.
- Responsible for Military Justice office of nine prosecutors and eight enlisted personnel, with an average case load of 150 active cases. Provided advice to four General Court-Martial and 43 Special Court-Martial convening authorities.
- Lead prosecutor in *United States v. Boykins*, involving the sabotage of thirteen parachutes and the aggravated assaults of four parachutists; and *United States v. Lord*, involving a serial child rapist and interstate transportation of child pornography.

2000-2001 **3B Prosecutorial District** **Beaufort, NC**

Assistant District Attorney

- State prosecutor in superior, district, and juvenile courts.

1999–2000 **Ward and Smith, P.A.** **New Bern, NC**

Associate, Litigation Section

- Litigation attorney in plaintiffs' personal injury practice, specializing in wrongful death, medical malpractice, aviation, and Federal Tort Claims Act cases.

1998–1999 **U.S. Marine Corps Forces, Atlantic** **Camp Lejeune, NC**

Trial Counsel, Aviano Mishap

- One of three criminal prosecutors in three high-profile trials involving the collision of a military jet with a ski gondola system in Cavalese, Italy that caused the deaths of twenty European tourists.
- Primary trial team liaison for twenty victims' family members from Italy, Poland, Austria, Germany, Belgium, and the Netherlands.
- Participated in thirteen weeks of in-court litigation including international depositions, extensive expert preparation and testimony in aviation-related fields, and eyewitness testimony in Italian and German.
- Responsible for creation and presentation of computer simulation using PowerScene terrain visualization, the first use of this technology in a courtroom setting. Coordinated with the Central Intelligence Agency to obtain high-resolution imagery for display in a public forum.

1996–1998 **Joint Law Center, Marine Corps Air Station** **Cherry Point, NC**

Chief Trial Counsel

- Prosecuted over 70 trials, including six contested members trials and seven contested judge alone trials. Charges included rape, aggravated assault, theft, narcotics, obstruction of justice, and other military offenses.
- Co-counsel for one of the "Operation Longfuse" cases, *United States v. Witham,* involving the theft and sale of explosives to militia groups. Worked closely with the Naval Criminal Investigative Service, FBI, ATF, and U.S. Marshals Service to include a key witness in the Federal Witness Protection Program.

MILITARY EXPERIENCE

1989–1993 **Second Marine Aircraft Wing** **Cherry Point, NC**

KC-130 Pilot and Legal Officer

- Naval Aviator assigned to Marine Aerial Refueler Transport Squadron 252 flying KC-130 aircraft.
- Legal Officer to the Commanding Officer, Marine Aircraft Group 14.
- Participated in Operation Desert Storm and relief operations in the wake of Hurricane Andrew.
- Marine Corps liaison officer for two computer wargame exercises with the U.S. Southern Command conducted in Chile and Paraguay.

1987–1989 **Basic Officer and Naval Flight Training**

Second Lieutenant, Student Naval Aviator

- Completed Basic Officer Course, The Basic School, Quantico, VA (1987).
- Completed Naval Aviation "Flight School," NAS Corpus Christi, TX and Pensacola, FL (1988-89).

TEACHING EXPERIENCE

- Adjunct professor for "9/11 Law" undergraduate honors seminar, University of North Carolina at Charlotte (2016-2017).
- Adjunct professor (Military Law, Ethics and Trial Practice, Advanced Evidence), Charlotte School of Law (2012-2015).

- Continuing Legal Education (CLE) presenter, Mecklenburg County Bar and North Carolina Bar Association (2009-2016).
- Adjunct faculty instructor on military justice and law of armed conflict issues, Defense Institute of International Legal Studies conferences in Uruguay and Argentina (August 18-28, 2008).
- Frequent guest lecturer at numerous law schools on ethics and professional responsibility: Widener University, Duke University, Campbell University, University of California - Berkeley, Elon University, Florida State University, University of Georgia, United States Naval Academy, University of Virginia, George Mason University, American University, University of North Carolina at Charlotte, University of Richmond, University of Washington at St. Louis.
- Guest lecturer, Humboldt Universität, Berlin, Germany (November 16, 2009).
- Panel member, American Bar Association Criminal Justice Section, 2007 Fall Conference, regarding ethics and professionalism in plea negotiations (November 2, 2007).
- Keynote speaker, Chicago Bar Association Ethics Conference, "Navigating the Moral Compass" (June 7, 2007).
- Panel member for American Bar Association Aviation Law Section, symposium on the criminalization of aviation mishaps, New York City, New York (May, 2000).
- Lectured on aviation computer-generated reconstruction evidence at Embry-Riddle University's Aviation Law Symposium, Daytona Beach, Florida (January, 2000).

EDUCATION

The George Washington University Law School **Washington D.C.**

- LL.M. (With Highest Honors), Litigation and Alternative Dispute Resolution program, 2008.

Campbell University **Buies Creek, NC**

- J.D., 1996.
- Aviation Law book award.
- Member of National Trial Competition Team, Honor Court, and Order of Old Kivett (for trial advocacy).

Duke University **Durham, NC**

- B.A., Political Science, 1987.
- Battalion Commander, Naval ROTC Midshipman Battalion (Fall 1986).
- Vice President, Pi Kappa Alpha Fraternity.

MILITARY EDUCATION

- Military Judge's Course, The Judge Advocate General's School of the U.S. Army, Charlottesville, VA (2006).
- Basic Lawyer Course (with honors), Naval Justice School, Newport, RI (1996).
- Survival Evasion Resistance and Escape (SERE) School, NAS Brunswick, ME (1990).
- Officer Candidate School, Quantico VA (1986).
- U.S. Army Basic Parachutist Course (Jump School), Fort Benning, GA (1985).

AWARDS

- American Bar Association Criminal Law Section, Norman Maleng "Minister of Justice" Award 2007. Given annually to a single prosecutor who embodies the principles enunciated in the *ABA Standards for Criminal Justice*, Prosecution Function, particularly that "the Duty of the prosecutor is to seek justice, not merely to convict."
- *Arbeitsgemeinschaft Strafrecht im Deutschen AnwaltVerein* (German Bar Association Criminal Law Section), "Pro Reo" Award 2009. Given annually to acknowledge an individual's commitment to the rule of law, which recognizes that judgment must be made "in favor of the accused if there is doubt about the guilt of the accused." First occasion this award has been presented to a foreign recipient.
- (b)(6)

- Military Awards: Legion of Merit, Defense Meritorious Service Medal, Meritorious Service Medal (2 awards), Navy-Marine Corps Achievement Medal, National Defense Service Medal (2 awards), Humanitarian Service Medal, Global War on Terrorism Service Medal, Southwest Asia Service Medal, and Kuwaiti Liberation Medal.

PUBLICATIONS

- Published appellate opinions: *United States v. Edwards,* 65 M.J. 622 (N.M.Ct.Crim.App. 2007); *United States v. Markert,* 65 M.J. 677 (N.M.Ct.Crim.App. 2007); *United States v Holmes,* 65 M.J. 684 (N.M.Ct.Crim.App. 2007); *United States v. Wheeler,* 66 M.J. 590 (N.M.Ct.Crim.App. 2008); *United States v. Yammine,* 67 M.J. 717 (N.M.Ct.Crim.App. 2009).
- Dedication, *Professor Thomas P. Anderson,* 34 Campbell L. Rev. 1 (2011).

MEDIA ARTICLES & APPEARANCES

- Jess Bravin, *The Conscience of the Colonel,* WALL STREET JOURNAL, Mar. 31, 2007, at A1.
- Jess Bravin, "The Terror Courts: Rough Justice at Guantanamo Bay" (Yale University Press, 2013).
- Jeffrey Stern, *For God and Country,* DUKE MAGAZINE, Volume 93, No.5, Sep.- Oct. 2007, at 46.
- John Goetz, *Von Duisburg nach Guantanamo - die Karriere des Häftlings Nr. 760* [*From Germany to Guantanamo: The Career of Prisoner No. 760*], DER SPIEGEL (Berlin), Oct. 6, 2008, at 100.
- Media appearances on Fox News, the Diane Rehm Show, the Leonard Lopate Radio Show, Democracy Now, and Huffington Post Live.
- Documentary film appearances:

  Torturing Democracy. Prod. Sherry Jones. Washington Media Associates/National Security Archive, 2008.

  NOW on PBS, "Duty vs. Conscience at Gitmo." Prod. Alexandra Dean. Public Broadcasting Service, 2009.

  Seconds From Disaster, "Cable Car Collision." Prod. Lucy Ridhout. National Geographic Channel, 2011.

OTHER QUALIFICATIONS

- Extensive travel experience to 27 foreign countries on four continents.
- Speak and read Spanish.
- Top Secret/Sensitive Compartmented Information (TS/SCI) security clearance (not current).
- FAA Commercial Pilot certification (inactive).

MEMBERSHIPS

- North Carolina State Bar
- Mecklenburg County Bar
- Board of Directors, Bach Akademie Charlotte
- Former assistant scoutmaster, Troop 16, Charlotte-Mecklenburg Council, Boy Scouts of America

PERSONAL INFORMATION

- Raised in Asheboro, North Carolina.
- Interests include travel, shooting sports, reading and CrossFit.

Quality Ranking Factors

1. Ability to demonstrate the appropriate temperament to serve as a Board Member.

   Throughout my legal career I have been committed to fairness and professionalism in the American justice system. I know how to make hard but fair decisions that respect the rule of law. I have significant experience working with other judges as part of an appellate tribunal, and people from across the spectrum of race, religion, economic status, and political views. I have a deep affection for the law, and have been a public servant for the majority of my life.

   Respect is an essential virtue of the legal profession, especially for an appellate level adjudicator. My experience as an appellate judge taught me the importance of reviewing the record of trial and the assignments of error, faithfully applying the standard of review, conducting thorough research of controlling precedent, and developing a proposed legal conclusion. But the process only succeeds if these steps are followed with a collegial and open-minded collaboration with fellow judges to resolve the issues. While differing opinions may be earnest, this collaboration works best with a presumption they are well intentioned and indeed required to reach an informed decision. The common denominator is respect: for the trial court, the litigants, controlling law, and fellow decision-makers.

2. Knowledge of immigration laws and procedures.

   As an Immigration Judge, I have entered final decisions in thousands of cases. Most of my adjudications require an extensive written or oral decision, and have been the subject of over 1,056 unpublished decisions issued by the Board of Immigration Appeals. Five of my cases have been affirmed in published decisions by the Fourth Circuit Court of Appeals, and one by the Attorney General. *See* QRF 4.

3. Proven ability to manage cases, preferably in a high volume context.

   I conduct hearings every day, and preside over an average of 70 separate cases every week. I typically spend 30 hours per week on the bench, and approximately 15 hours in chambers writing decisions and adjudicating written motions. Along with a legal assistant, I manage a current docket of over 3,500 active cases. Our court has three law clerks to assist four Immigration Judges.

4. Experience handling complex legal issues.

   As an Immigration Judge, I have decided cases related to a wide variety of complex issues, including some of first impression and developing law affirmed by the Fourth Circuit Court of Appeals. *See Shaw v. Sessions,* No. 17-1213, ___F.3d ___ (4th Cir. 2018) (controlled substance aggravated felony); *Mahmood v. Sessions,* 849 F.3d 187 (4th Cir. 2017) (asylee adjustment of status); *Tiscareno-Garcia v. Holder,* 780 F.3d 205 (4th Cir. 2015) (illegal entry convictions); *Hernandez-Zavala v. Lynch,* 806 F.3d 259 (4th Cir. 2015) (circumstance specific analysis); and *Pastora v. Holder,* 737 F.3d 902 (4th Cir. 2013) (persecutor bar).

As an appellate military judge, two of my opinions related to issues of first impression in military law for the Naval Service. *See United States v. Markert,* 65 M.J. 677 (N.M.Ct.Crim.App. 2007); *United States v. Wheeler,* 66 M.J. 590 (N.M.Ct.Crim.App. 2008). As a senior prosecutor in the Office of Military Commissions from 2003 through 2006, I served as lead counsel in *United States v. Hamdan*, and liaison to Solicitor General Paul Clement in his preparation for oral argument before the U.S. Supreme Court *habeas* litigation of *Hamdan v. Rumsfeld,* 548 U.S. 557, 126 S. Ct. 2749 (2006), a landmark case regarding separation of powers and Presidential authority during wartime. I was the team chief for cases of alleged al Qaeda planners and financiers detained at Guantánamo Bay, Cuba, for the first trials by military commission since World War II.

As a trial level prosecutor in the Marine Corps, I was responsible for several complex cases that led to the development of significant military law precedent. *See United States v. Ashby,* 68 M.J. 108 (C.A.A.F. 2009) (unlawful command influence); *United States v. Schweitzer,* 68 M.J. 133 (C.A.A.F. 2009) (obstruction of justice); *United States v. Green,* 55 M.J. 76 (C.A.A.F. 2001), *cert. denied,* 534 U.S. 998 (2001) (drug urinalysis expert evidence); and *United States v. Roberson,* 65 M.J. 43 (C.A.A.F. 2007) (M.R.E. 803(3) evidence).

5. Experience conducting administrative hearings, including proven ability or potential to serve as an effective decision-maker.

   See QRFs 2, 3, and 4.

6. Knowledge of judicial practices and procedures.

   In 2006 I graduated from the Military Judge's Course of the Judge Advocate General's School of the U.S. Army in Charlottesville, Virginia. The course provides military attorneys with advanced schooling required by all branches of the U.S. Armed Forces to qualify as full-time military judges at courts-martial. Topics of instruction included substantive military criminal law, trial procedures, defenses, instructions, evidence, decision-making methods, and professional responsibility.

   In 2007 I completed the New Appellate Judges Seminar sponsored by the Institute of Judicial Administration (IJA) at New York University School of Law, designed for appellate judges from state and federal appeals courts. The seminar included practical training on issues of collegiality, ethics and opinion writing, and substantive law instruction related to statutory interpretation and procedural due process.

   Since my appointment as an Immigration Judge in 2010, I have been an active volunteer participant in EOIR, to include serving on the precedent committee, as a training mentor to three new judges, and an instructor for new judge training in Falls Church.

7. Excellent analytical, decision-making, and writing abilities.

   See QRF 4. My written immigration decisions are available on the EOIR Intranet; my military decisions are available on Westlaw or http://www.jag.navy.mil/courts/opinion_archive.htm. Published appellate opinions: *United States v. Edwards,* 65 M.J. 622 (N.M.Ct.Crim.App.

2007); *United States v. Markert,* 65 M.J. 677 (N.M.Ct.Crim.App. 2007); *United States v Holmes,* 65 M.J. 684 (N.M.Ct.Crim.App. 2007); *United States v. Wheeler,* 66 M.J. 590 (N.M.Ct.Crim.App. 2008); *United States v. Yammine,* 67 M.J. 717 (N.M.Ct.Crim.App. 2009); *United States v. Purdy,* 67 M.J. 780 (N.M.Ct.Crim.App. 2009). Published law review article: Dedication, *Professor Thomas P. Anderson,* 34 Campbell L. Rev. 1 (2011).

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Fulghum, Thomas E
Thomas E. Fulghum, Attorney at Law, PA
331 W. Main St., Suite 604
Durham, NC 27701

DHS/ICE Office of Chief Counsel - CHL
5701 Executive Ctr Dr., Ste 300
Charlotte, NC 28212

Name: (b)(6) (b)(6)

Date of this notice: 3/29/2016

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Holmes, David B

Userteam: Docket

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

MAHMOOD, RIAZ
108 MCDONALD DRIVE
ROCKINGHAM, NC 28379

DHS/ICE Office of Chief Counsel - CHL
5701 Executive Ctr Dr., Ste 300
Charlotte, NC 28212

Name: (b)(6) [redacted] (b)(6) [redacted]

Date of this notice: 3/29/2016

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Holmes, David B.

Userteam: Docket

File: (b)(6) Charlotte, NC Date: MAR 29 2016

In re: (b)(6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thomas E. Fulghum, Esquire

ON BEHALF OF DHS: Susan Lecker
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] -
Inadmissible at time of entry or adjustment of status under section 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182 (a)(6)(C)(i)]

APPLICATION: Waiver of inadmissibility under section 209(c) of the Act

The respondent, a native and citizen of Pakistan, has filed a timely appeal of an Immigration Judge's December 15, 2014, decision, which denied his application for a waiver of inadmissibility, under section 209(c) of the Immigration and Nationality Act, 8 U.S.C. § 1159(c). Both the respondent, and the Department of Homeland Security (DHS), have filed briefs concerning the decision of the Immigration Judge. We deny the respondent's request for a three Board Member review of his case, as the case does not fall under any of the categories warranting such review. *See* 8 C.F.R. § 1003.1(e)(6). The appeal will be dismissed.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. § 1003.1(d)(3). The respondent, in his brief, adopts the facts as set out by the Immigration Judge in his decision (Respondent's Br. at 2). As the respondent is subject to removal from the United States, it is his burden to establish eligibility for relief from removal. *See* section 240(c)(4)(A) of the Act; 8 C.F.R. § 1240.8(d).

On September 30, 1997, the respondent's application for asylum was approved, under section 208(a) of the Act (I.J. at 5). On April 8, 2002, a nonimmigrant visa application was filed in the respondent's name, listing his address as being in Pakistan, and denying that the respondent had ever been in the United States. *Id.* The application was denied on April 25, 2002. *Id.* According to a DHS report, the respondent left the United States on a Pakistani passport on March 17, 2003, and entered the United States on July 11, 2005 (I.J. at 6). On March 23, 2006, the respondent filed an application for a refugee travel document to visit his wife and children in Thailand. *Id.* The respondent denied that he had returned to Pakistan after being granted asylee status in the United States. *Id.* The refugee travel document was approved on July 7, 2006. *Id.*

On July 28, 2006, the respondent's wife filed a nonimmigrant visa application, which was later denied, which listed her address as being in Pakistan. *Id.* The application denied that the respondent had legal permanent residence in the United States. *Id.* A similar application was made, and denied, on November 8, 2006. *Id.* According to a DHS report, the respondent left the United States on a Pakistani passport on February 27, 2007, and entered the United States on July 1, 2007 (I.J. at 7).

On December 10, 2007, the respondent filed a second application for a refugee travel document to visit his wife and children in Thailand. *Id.* The respondent again denied that he had returned to Pakistan after being granted asylee status in the United States. *Id.* The second refugee travel document was approved on August 17, 2008. *Id.* According to a DHS report, the respondent left the United States on a Pakistani passport on March 6, 2008, and entered the United States on November 25, 2008. *Id.* According to a DHS report, the respondent left the United States on a Pakistani passport on March 10, 2009. *Id.*

On April 8, 2011, the respondent filed an application for adjustment of status. *Id.* The application was approved by the DHS United States Citizenship and Immigration Services, and the respondent adjusted status on December 8, 2012. *Id.* In the adjustment of status application, the respondent denied that he had ever sought to procure a visa by fraud. *Id.*

The Immigration Judge found that the respondent was subject to removal under section 237(a)(1)(A) of the Act, in that ". . . the evidence clearly demonstrates the respondent has made multiple false statements and material misrepresentations of fact in order to obtain at least three immigration benefits: two refugee travel documents and his adjustment of status to that of a lawful permanent resident" (I.J. at 8-10).[1]

[1] In a supplemental filing, the respondent urges us to reconsider his removability in light of a recent decision of the United States Court of Appeals for the Fifth Circuit, *Ali v. Lynch*, __ F.3d __, 2016 WL 711286 (5th Cir. Feb. 22, 2016). Relying on *Matter of C-J-H-*, 26 I&N Dec. 284 (BIA 2014), the Board in that case found that Ali's asylum status was terminated when he adjusted to lawful permanent resident status and, as a result, his asylum status did not need to be terminated to begin removal proceedings. The Fifth Circuit decided that the Board did not properly exercise its discretion under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when it issued the decision in *Matter of C-J-H-, supra.* The Fifth Circuit consequently remanded the case to the Board for further proceedings. *Ali v. Lynch, supra.* The respondent's reliance on a decision from the Fifth Circuit does not apply here, as this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Matter of U. Singh*, 25 I&N Dec. 670, 672 (BIA 2012). In any event, we decline to revisit our decision in *Matter of C-J-H-, supra.*

(b)(6)

The respondent sought a waiver of inadmissibility nunc pro tunc under section 209(c) of the Act, to the date of his adjustment of status to lawful permanent resident status on December 8, 2012. That is, the respondent asserts that he is eligible for a waiver under section 209(c) of the Act, because the grounds for inadmissibility occurred before his adjustment of status, not after such adjustment of status. The respondent's arguments on appeal (Respondent's Br.), do not persuade this Board that the respondent is eligible for a waiver of inadmissibility under section 209(c) of the Act.[2] Rather, for the reasons stated by the Immigration Judge (I.J. at 10-11), we conclude that the respondent cannot obtain a section 209(c) waiver nunc pro tunc.

Moreover, even if we assume for the sake of argument that such a waiver could be granted nunc pro tunc in exceptional situations, the respondent has not demonstrated that he merits such extraordinary relief. Our present practice is to allow immigration benefits to be granted nunc pro tunc (if at all) only as an equitable means to correct injustice, such as where the benefit could have (and *should* have) been granted earlier but was withheld due to error or malfeasance on the part of a governmental officer. Yet here, the facts which would have alerted the DHS to the potential necessity of a section 209(c) waiver in the respondent's case (i.e., the respondent's material misrepresentations and fraudulent conduct) were never disclosed by the respondent, despite his duty to disclose them. The fact that his fraudulent conduct came to light in these removal proceedings does not provide the respondent with an equitable basis for seeking such a waiver nunc pro tunc. DHS Br. at 3-5.

The appeal will, therefore, be dismissed.

ORDER: The appeal is dismissed and the Immigration Judge's order of removal is affirmed.

FOR THE BOARD

[2] The respondent cites to an unpublished decision from the United States Court of Appeals for the Ninth Circuit, *Jovel v. Holder*, 402 Fed.Appx. 273 (9th Cir. Nov. 2, 2010)(unpublished) (Respondent's Br. at 3-4). The decision is not binding here. *Matter of U. Singh*, *supra*; I.J. at 10. In any event, the Ninth Circuit in that case remanded the case to the Board, because the Immigration Judge and Board had not addressed whether a section 209(c) waiver might be granted nunc pro tunc to that respondent. Upon such remand, the Immigration Judge found that respondent ineligible for the waiver, and the Board affirmed this decision.

IMMIGRATION COURT
5701 EXECUTIVE CENTER DR. #400
CHARLOTTE, NC 28212

In the Matter of

(b)(6) [redacted]

Respondent

Case No.: (b)(6) [redacted]

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the ~~oral~~ decision entered on 12/15/14.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to PAKISTAN.
~~or in the alternative to .~~

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to .

Respondent's application for:

[ ] Asylum was ( )granted ( )denied( )withdrawn.

[ ] Withholding of removal was ( )granted ( )denied ( )withdrawn.

[X] A Waiver under Section 209(c) was ( )granted (X)denied ( )withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ____ was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[X] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: ~~Oct 31,~~ 2014
DEC 15,

V. Stuart Couch

V. STUART COUCH
Immigration Judge

Appeal: Waived/Reserved R Appeal Due By:

1/14/2015

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
CHARLOTTE, NORTH CAROLINA

IN THE MATTER OF	)	IN REMOVAL PROCEEDINGS
(b)(6) [redacted]	)	File No: (b)(6) [redacted]
Respondent.	)	MINUTE ORDER
	)	December 15, 2014

CHARGES: Section 237(a)(1)(A) of the Immigration and Nationality Act ("INA")

APPLICATIONS: Waiver of inadmissibility under INA § 209(c)

ON BEHALF OF RESPONDENT:
Thomas Fulghum, Esq.

ON BEHALF OF THE GOVERNMENT:
Susan Lecker, Assistant Chief Counsel
Department of Homeland Security

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

The respondent is a male native and citizen of Pakistan. On September 12, 2013, the Department of Homeland Security ("DHS") served a Notice to Appear to the respondent, charging him with removability under section 237(a)(1)(A) of the Immigration and Nationality Act. Exhibit 1. The Court scheduled the respondent for a master calendar hearing on November 13, 2013. On October 29, 2013, the DHS filed a motion to consolidate the respondent's proceedings with that of his wife (b)(6) [redacted]) and children ((b)(6) [redacted], (b)(6) [redacted]). The Court (Holmes-Simmons, J.) granted the DHS's motion on November 5, 2013.

On November 8, 2013, the respondent, through counsel, filed a motion asking the Court to reconsider its November 5, 2013, order consolidating his proceedings with that of his wife and children. The Court denied the respondent's motion to reconsider in a written decision entered on January 22, 2014.

The DHS amended the NTA with a Form I-261 on April 8, 2014. Exhibit 1A. On April 10, 2014, the respondent, through counsel, filed a motion *in limine* to prohibit the Court's consideration of his prior testimony in a contested removal hearing on January 19, 2012,

related to a previous NTA later terminated by the DHS. The Court denied the respondent's motion in a written decision entered on April 16, 2014.[1]

At a contested removal hearing held on July 10, 2014, the Court considered evidence filed by the DHS, and denied the respondent's motion to terminate the proceedings. The respondent testified in rebuttal. The Court issued an oral decision sustaining the respondent's charge of removability under INA § 237(a)(1)(A), as an alien who obtained his adjustment of status to Legal Permanent Resident (LPR) by fraud or willful misrepresentation of a material fact under INA § 212(a)(6)(C)(i). The Court's findings of fact and conclusions of law are discussed *infra*.

On August 21, 2014, the respondent, through counsel, filed an application for a waiver of inadmissibility under INA § 209(c), and a memorandum of law setting forth his eligibility for this relief. The DHS filed a brief in opposition on August 22, 2014, which the Court treats as a motion to pretermit the respondent's application for relief.

On October 31, 2014, the respondent's wife withdrew her Form I-589 application for asylum, withholding of removal, and protection under the United Nations Convention Against Torture, with prejudice. The Court granted pre-conclusion voluntary departure to her and the respondent's three children under INA § 240B(a), with the stipulation of the DHS.

For the reasons set forth below, the Court finds that the respondent is removable as charged in the NTA, and denies his application for relief from removal.

II. Evidence Presented

The Court has reviewed and considered all evidence submitted by the parties, whether it is expressly referred to in this decision or not.

A. Documentary Evidence[2]

Exhibit 1:	Notice to Appear
Exhibit 1A:	Amended Notice to Appear (Form I-261)
Exhibit 2:	DHS' evidence (with tabs A through H) filed April 9, 2014
Exhibit 3:	Respondent's photograph
Exhibit 4:	Affidavit from Respondent's brother filed July 10, 2014
Exhibit 5:	Respondent's application for a waiver under INA § 209(c) (Form I-602) filed August 21, 2014

[1] The Court did not consider the respondent's prior testimony, or its subsequent findings, in its determination of his removability alleged in the NTA issued on September 12, 2013.

[2] Due to the voluminous nature of the record of proceedings, the Court will only mark and refer to those as documents necessary to decide the respondent's removability and statutory eligibility for relief from removal.

B. Testimonial Evidence[3]

The respondent's testimony is summarized as follows:

The respondent denied that he has ever returned to Pakistan since he received asylum status in the United States in 1997. The respondent denied filing any of the documents submitted by the DHS, explaining that it was his brother (b)(6) who filed the documents in an attempt to help his wife, the rider respondent. The respondent testified that he and his brother look like twins. When the respondent's brother applied for the visa, he had the respondent's passport and some other documents in his possession. The respondent testified he found out from his wife that his brother had filed the documents in his name approximately three weeks later. The respondent testified he had no idea that his brother was going to file this on his behalf. He claims that he and his brother had an argument because the respondent knew he had an asylum application pending in the United States. His brother, (b)(6) justified his actions by stating that the respondent's wife was being threatened by the Haqiqi movement, and wanted to have the visa done as soon as possible.

The respondent has another brother named (b)(6) who is a United States citizen. (b)(6) filed a sponsorship letter on behalf of the respondent's parents and sister. These visas were granted without an interview in 2001 or 2002.

The respondent testified his brother (b)(6) told him he appeared at the United States Embassy with their parents, and their visa application was rejected. When the brother (b)(6) tried to help the rider respondent file her visa application, it also was rejected. At this point, the brother, on the behalf of respondent and respondent's wife, reapplied for visas for both lead and rider respondent. These applications were also rejected.

On cross examination, the respondent reiterated that his brother (b)(6) filed a visa application without his knowledge, which he became aware of two or three weeks later, sometime in April 2002. When asked how his brother (b)(6) obtained a passport in his name, the respondent was nonresponsive.[4] When asked whether the respondent has ever obtained a Pakistani passport, the respondent was again nonresponsive. He later explained that his brother (b)(6) had him sign forms to obtain a passport and a United States visa when he was visiting with the rider respondent in Thailand.

The respondent admitted he signed the visa applications and passport forms provided to him by his brother (b)(6) and knew the applications would be filed in an effort to obtain a visa. The respondent testified his brother (b)(6) provided the photographs that accompanied the applications. The respondent contends his brother (b)(6) told him at the

[3] The DHS did not call any witnesses to testify, and contended that the disputed factual allegations contained in the NTA (as amended) were supported by the documentary evidence submitted as Exhibit 2. The respondent, through counsel, made an oral motion to terminate the proceedings on the grounds the DHS failed to call any witnesses to meet its burden of proof, or demonstrate that the respondent actually signed or submitted the various applications submitted to the Court. The respondent's motion to terminate was denied, and the Court found the DHS had met its burden by clear and convincing evidence that the respondent is removable as charged. The respondent then elected to testify in an attempt to rebut the DHS' documentary evidence.

[4] The Court notes that at this time, the respondent evaded the question and changed the subject.

time he could file the applications to obtain the passport, but the respondent did not know his brother would do it without his specific approval. The respondent admitted that in April 2002 his brother (b)(6) obtained a Pakistani passport in his name because he signed the form while meeting with the rider respondent in Thailand.

The respondent testified he did not possess a Pakistani passport when he applied for asylum in 1997. The respondent denied he has ever possessed a Pakistani passport.

The respondent admitted that he has seen the documents filed by the DHS, and that his date of birth is (b)(6) . When asked if he had ever used a Pakistani passport to leave or reenter the United States, the respondent answered that he "[did] not remember."[5] When shown two applications for refugee travel documents, the respondent confirmed his signature on both. Exhibit 2, tab E, at 16, 19. The respondent admitted he requested travel documents as a refugee to travel to Thailand or Dubai in March 2006. The respondent testified he was granted asylum in 1997, and reiterated he has never possessed a Pakistani passport.

The respondent was asked if he stated on the 2006 refugee travel document application that he had not obtained a passport from Pakistan since receiving his refugee status. The respondent replied that his lawyer at the time was the one who completed the application, as he himself did not understand English. He just signed the application, gave the photographs, and paid the lawyer a fee. He states he never read the application to know what he was signing, and the attorney representing him never had anyone translate the documents. The respondent contends the subsequent travel document application in 2008 was prepared in the same manner. Exhibit 2, tab F, at 17-19. The respondent denied that he never filed a professional complaint against the attorney who prepared the documents.

The respondent again testified he knew in April 2002 that his brother (b)(6) had filed applications with the United States Consulate in his name, and that he was angry because he had an asylum application pending in the United States. The DHS, however, asked the respondent how this could be true, since his asylum application had been granted five years prior in 1997. The respondent asserted that he did not say there was an asylum application pending, but instead that he was angry because he already had asylee status in the United States. He further clarified this statement by saying that he had asylee status, but his legal permanent resident and subsequent citizenship status was pending at the time.[6]

On redirect examination, the respondent testified that he "can't recall" if he has ever used or possessed a Pakistani passport, and that he "can't remember" if he has ever possessed such passport while he has been in the United States.[7] Upon questioning by the Court, the respondent admitted using a Pakistani passport when he traveled to Dubai from the United States, although he cannot remember when he obtained it. The respondent testified he obtained the passport from the Pakistani Embassy in Washington DC, after he presented a national identification card to officials. The respondent testified that he does not remember what year he obtained this passport. The respondent testified he has renewed the passport one time since he

[5] The Court notes that initially the respondent was nonresponsive and refused to answer the question.
[6] The Court notes that this is a direct contradiction to the respondent's earlier testimony.
[7] The Court notes that the respondent did not maintain eye contact during this portion of his testimony. The respondent also shifted in his seat and took ten or more seconds to answer each question.

received it. The respondent testified he no longer has the passport in his possession, as he left them in Dubai in the year 2009. The respondent explained he obtained a passport in order to meet his wife in Dubai, and that he in fact traveled on the passport during that trip. The respondent's wife had applied for a United States visa three times and had been denied each time. He explained that his family was desperate to get out of Pakistan, so he wanted to take them to Dubai. He ultimately flew his family from Dubai to Russia to Cuba, and then to Mexico, and was attempting to get his family into the United States across the border. The respondent again testified he cannot remember when he obtained the passport from the Pakistani embassy.

The respondent explained that he is currently fasting and not thinking well.[8] The respondent told the Court that "if [they] wanted to send [him] back home that's fine." He explained he traveled to Dubai on the Pakistani passport in order to get his family out of the country because their life was threatened there. The respondent contends he has never been in trouble while in the United States or committed any crimes, that he and his fifteen year old son are hard workers, and that the government should just remove him if that's what they want to do.

The remainder of the respondent's testimony is contained in the verbatim transcript from the hearing conducted on July 10, 2014.

C. Findings of Fact

The respondent, through counsel, admitted factual allegations 1 and 2 in the NTA, and allegations 3 and 7 in the amended NTA. Exhibits 1, 1A.

Upon review of the evidence of record, the Court finds the following:

1. That Respondent is a native and citizen of Pakistan and not of the United States. Exhibit 1.

2. That on September 30, 1997, Respondent's application for asylum was approved pursuant to INA § 208(a). Exhibit 2, tab A at 1. Respondent was advised he may apply for adjustment of status under INA § 209(b). *Id.* at 2. The approval letter was signed by Respondent. *Id.*

3. That on April 8, 2002, a nonimmigrant visa application was filed in Respondent's name listing his home address as (b)(6) Pakistan" and containing his photograph.[9] *Id.*, tab B at 3. The visa application lists Respondent's wife and three children as persons traveling with the applicant, and denies the applicant has "ever been in the U.S." *Id.*, tab B at 3. The application was denied on April 25, 2002. *Id.* at 3.

[8] The Court notes that this hearing occurred during the Islamic month of Ramadan.
[9] Having seen Respondent in person, the Courts observes that the photograph is identical to Respondent.

4. That according to a report obtained from the "US-VISIT Arrival Departure Information System" maintained by the DHS, Respondent departed the United States by airplane on March 17, 2003, using Pakistani passport "(b)(6)." [10] *Id.*, tab G at 20-21.

5. That on July 11, 2005, the US-VISIT report reflects Respondent entered the United States at Detroit with a visa "(b)(6)." *Id.*

6. That on March 23, 2006, Respondent filed a Form I-131 application for a refugee travel document to visit his wife and children in Bangkok, Thailand. *Id.*, tab E at 14-15.

7. That on his Form I-131 application Respondent listed Pakistan as the country from which he is an asylee. *Id.* at 15. Respondent answered "no" the following questions:
"Do you plan to travel to the above named country?"
"Since you were accorded refugee/asylee status, have you ever:
a. returned to the above named country?
b. applied for and/or obtained a national passport, passport renewal or entry permit of that country?"

8. That Respondent's Form I-131 application was approved on July 7, 2006. *Id.* at 14.

9. That on July 28, 2006, a nonimmigrant visa application was filed in the name of Respondent's wife, (b)(6) listing her home address as "(b)(6) Pakistan" and containing her photograph.[11] *Id.*, tab C at 6. The visa application lists Respondent as the applicant's spouse, and denies that he has legal permanent residence in the United States. *Id.* at 7, paragraph 37. The application was denied. *Id.* at 6.

10. That on November 8, 2006, a second nonimmigrant visa application was filed in the name of Respondent's wife, (b)(6) listing her home address as (b)(6), Pakistan" and containing her photograph. *Id.*, tab D at 9. The visa application lists Respondent as the applicant's spouse, and denies that he has legal permanent residence in the United States. *Id.* at 10, paragraph 37. A letter filed with the application and signed by Ms. (b)(6) states "[m]y husband is a well-established businessman in (b)(6)." *Id.* at 13. The application was denied. *Id.* at 9.

[10] The United States Visitor and Immigrant Status Indicator Technology Program ("US-VISIT") is "an integrated, automated entry exit system that records the arrival and departure of aliens; verifies aliens' identities; and authenticates aliens' travel documents through comparison of biometric identifiers." United States Visitor and Immigrant Status Indicator Technology Program ("US-VISIT"), 69 Fed.Reg. 53,318–01 (Aug. 31, 2004) (to be codified at 8 C.F.R. pts. 215, 235, 252). In 2013, the Office of Biometric Management ("OBIM") replaced US-VISIT. *Garcia v. Holder*, 732 F.3d 308, 309 n.1 (4th Cir. 2013).

[11] Having seen Respondent's wife in person, the Courts observes that the photograph is identical to her.

11. That on February 27, 2007, the US-VISIT report reflects Respondent departed the United States using Pakistani passport "(b)(6)." *Id.*, tab G at 20-21.

12. That on July 1, 2007, the US-VISIT report reflects Respondent entered the United States at Detroit with refugee reentry permit "(b)(6)." *Id.*

13. That on December 10, 2007, Respondent filed a second Form I-131 application for a refugee travel document to visit his wife and children in Bangkok, Thailand. *Id.*, tab F at 17-18. Respondent again denied having returned to, or applied for a passport from, Pakistan. *Id.* at 18. Respondent's Form I-131 application was approved on August 17, 2008. *Id.* at 17.

14. That on March 6, 2008, the US-VISIT report reflects Respondent departed the United States using Pakistani passport "(b)(6)." *Id.*, tab G at 20-21.

15. That on November 25, 2008, the US-VISIT report reflects Respondent entered the United States at Detroit with refugee reentry permit "(b)(6)." *Id.*

16. That on March 10, 2009, the US-VISIT report reflects Respondent departed the United States using Pakistani passport "(b)(6)." *Id.*

17. That on August 8, 2011, Respondent filed a Form I-485 application for adjustment of status to lawful permanent resident, and was interviewed by an official of the United States Citizenship and Immigration Services (USCIS) on December 6, 2012. Exhibit 2, tab H at 22. Respondent's Form I-485 was approved and he adjusted status on December 8, 2012. *Id.*

18. That on his Form I-485 application Respondent denied he "by fraud or material misrepresentation of a material fact, ever sought to procure, or procured, a visa, other documentation, entry into the United States, or any immigration benefit[.]" *Id.* at 25, paragraph 9.

19. That the signature on Respondent's Form I-485 application is identical to the ones on his asylum approval letter, his two Form I-131 applications, and the nonimmigrant visa filed in his name. *Compare* Exhibit 2, tab H at 27; tab A at 2; tab E at 15; tab F at 17; and tab B at 4.

III. Removability

The burden is on the DHS to establish by "clear and convincing evidence" that an alien is removable as charged. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8; *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (holding that the "clear and convincing evidence" standard requires an "abiding conviction" on the part of the fact-finder that the truth of a fact is "highly probable"). Removability must be established by "reasonable, substantial, and probative evidence." *Id.* The regulations provide that "the immigration judge may receive into evidence

any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or another person." 8 C.F.R. § 1240.7(a).

In the present case, the DHS asserts that the respondent is removable under INA § 237(a)(1)(A) because his adjustment of status and two refugee travel documents were obtained by fraud or willful misrepresentation of a material fact, and therefore he is inadmissible under INA § 212(a)(6)(C)(i). Exhibit 1A. The DHS asserts the specific misrepresentations made by the respondent were his various denials that he had never returned to Pakistan, nor had applied for and obtained a renewal of his Pakistani passport. *Id.*, allegations 5,6, and 8. The DHS also asserts it was the respondent who filed an application for a nonimmigrant visa at a consular post in Pakistan on April 5, 2002. *Id.*, allegation 4.

For the reasons set forth below, the Court finds that the DHS has met its burden by clear and convincing evidence. The Court therefore sustains the charge of removability against the respondent pursuant to section 237(a)(1)(A) of the Act.

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible. INA § 212(a)(6)(C)(i). To determine whether an alien's misrepresentation was material, the evidence must demonstrate the alleged misrepresentation either resulted in the erroneous grant of a benefit, or that it had a "natural tendency" to affect the decision to grant the benefit sought. *Kungys v. United States*, 485 U.S. 759, 770-72 (1988); *see also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011); *United States v. Garcia-Ochoa*, 607 F.3d 371, 375 (4th Cir. 2010) ("The test of materiality is whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action.") (internal citations and quotation marks omitted); *Matter of D-R-*, 25 I&N Dec. 445, 450 (BIA 2011) (internal citation omitted) ("It is not necessary for the Government to show that the statement actually influenced the agency, only that the misrepresentation was capable of affecting or influencing the governmental decision."); *accord, Injeti v. U.S. Citizenship and Immigration Services*, 737 F.3d 311, 317 (4th Cir. 2013). Any alien in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien was inadmissible at the time of their adjustment of status. INA § 237(a)(1)(A).

The Court finds the evidence clearly demonstrates the respondent has made multiple false statements and material misrepresentations of fact in order to obtain at least three immigration benefits: two refugee travel documents and his adjustment of status to that of a lawful permanent resident. As a predicate matter, the Court is satisfied that the respondent signed all three of these applications for immigration benefits. Finding of Fact 19; Exhibit 2, tabs E, F and H. Using these applications and the respondent's signature on his asylum approval letters as exemplars, the Court is convinced that he also signed the nonimmigrant visa application filed in his name, with his photograph, at the consular post in Pakistan on April 8, 2002. *Id.*, tab B.

The respondent's record of travel contained in the US-VISIT report clearly demonstrates that he used three different Pakistani passports to depart the United States in 2003, 2007, 2008 and 2009. Findings of Fact 4, 11, 14, 16. The same record reflects he

reentered the United States with a visa in 2003, and two refugee travel documents in 2005, 2007, and 2008. Findings of Fact 5, 12, 15. The respondent's travel represents a concerted effort by him to avoid using his authorized travel documents to return to Pakistan, which he denied was his intention when he applied for them. Exhibit 2, tab E at 15, Part 6.2; tab F at 18. His travel using three Pakistani passports also demonstrates he made false statements regarding his possession of those passports in his two Form I-131 applications. Findings of Fact 7, 13. In that both of these Form I-131 applications were approved, the respondent successfully obtained immigration benefits by fraud and misrepresentation of material facts. Findings of Fact 8, 13.

For these reasons, the Court finds that the respondent made material misrepresentations of fact on his Form I-485 application, and thereby obtained his adjustment of status to that of lawful permanent resident by fraud. Specifically, the respondent's denial that he "by fraud or material misrepresentation of a material fact, ever sought to procure, or procured, a visa, other documentation, entry into the United States, or any immigration benefit" is contradicted by his travel record and his filing of a nonimmigrant visa application in Pakistan in 2002. Findings of Fact 3, 4, 5, 7, 11, 12, 13, 14, 15, 16. Moreover, the two nonimmigrant visa applications filed by the respondent's wife in July and November 2006, demonstrate he was living in Pakistan with her and their two children. Findings of Fact 9, 10.

In light of the documentary evidence provided by the DHS, the Court does not credit the respondent's rebuttal testimony of July 10, 2014. His demeanor while testifying was extremely poor and non-responsive. The Court does not credit his assertion that he cannot recall or remember certain events, or that he was physically inhibited during his testimony due to his fasting in observance of Ramadan. *Tassi v. Holder*, 660 F.3d 710, 720 (4th Cir. 2011). Further, the Court does not credit the respondent's claim that the 2002 visa application filed in his name in Pakistan was actually done by his brother, despite their family resemblance. Exhibits 3, 4. The Court does not credit the letter from the respondent's brother to support his claim either, as it is "not objective evidence in this context." *Djadjou v. Holder*, 662 F.3d 265, 276 (4th Cir. 2011).

The respondent's varying testimony did include his admissions to obtaining a passport from the Pakistani Embassy in Washington DC, and later traveling on that passport to Dubai in 2009. The respondent also testified he attempted to bring his family into the United States through Mexico. This admission contradicts his denial on the Form I-485 application that he has ever "knowingly encouraged, induced, assisted, abetted, or aided any alien to try to enter the United States illegally." Exhibit 2, tab H at 24.

The Court finds that the respondent's false responses on his Form I-485 application constitute a willful misrepresentation of fact on his part because he signed the application, and swore under oath that his answers to the questions were "true and complete to the best of [his] knowledge and belief." Exhibit 2, tab H at 27. The Court finds that the respondent's answers resulted in the approval of the application and his adjustment of status to a lawful permanent resident. *See United States v. Garcia-Ochoa*, 607 F.3d at 375.

The Court finds the evidence submitted by the DHS is reasonable, substantial, and probative evidence that demonstrates a high probability the respondent made material

misrepresentations of fact in his two Form I-131 applications for refugee travel documents, and his Form I-485 application for adjustment of status. 8 C.F.R. § 1240.8(a). The Court further finds the respondent obtained his refugee travel documents and lawful permanent resident status by fraud and willfully misrepresentation of material facts. INA § 212(a)(6)(C)(i).

Accordingly, the Court finds that the DHS has sustained its burden to show the respondent's charge of charge of removability is sustained under INA § 237(a)(1)(A). INA § 240(c)(3)(A).

IV. Stand-Alone INA § 209(c) Waiver

As relief from removal, the respondent seeks a waiver of inadmissibility *nunc pro tunc* under INA § 209(c) to the date of his adjustment to lawful permanent resident status on December 8, 2012. Respondent's Memorandum Regarding Relief filed August 21, 2014 at 1; Exhibit 2, tab H at 22. The respondent asserts he is eligible for INA 209(c) relief because the grounds for his inadmissibility occurred before his adjustment of status, as opposed to after. *Id.* at 2 (citing *Saintha v. Mukasey,* 516 F.3d 243, 253 (4th Cir. 2008) (alien's ground of inadmissibility resulted from criminal convictions after adjustment); and *Jovel v. Holder,* 402 Fed.Appx. 273 (9th Cir. Nov. 2, 2010) (remand for alien to pursue 209(c) relief *nunc pro tunc*)).

An alien granted asylum may adjust status to a lawful permanent resident if, *inter alia,* they are admissible "at the time of examination for adjustment of such alien." INA § 209(b). Section 209(c) of the Act provides a waiver of certain Section 212(a) grounds of inadmissibility for refugee aliens seeking adjustment of status "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 C.F.R. § 1209.2(b). A lawful permanent resident in removal proceedings retains that status until there is a final order of removal, consequently "as an asylee who already acquired LPR status, section 209(b) [of the Act] does not apply to him." *Matter of C-J-H-,* 26 I&N Dec. 284, 287 (BIA 2014) (quoting *Robleto-Pastora v. Holder,* 591 F.3d . 1051, 1059 n.6 (9th Cir. 2010). An alien whose status has been adjusted from asylee to lawful permanent resident cannot subsequently readjust his status under INA § 209(c). *Id.*

The Court finds that the respondent has already acquired status as a lawful permanent resident, is no longer a refugee, and therefore no longer able to seek adjustment of status under INA § 209(b). *Id.* The Court further finds that the respondent cannot subsequently readjust his status -- *nunc pro tunc* or *ab initio* -- under INA § 209(c). *Id.* The respondent's reliance on the Ninth Circuit's unpublished decision in *Jovel v. Holder* is misplaced, and the Court does not find it persuasive.

The practical effect of the respondent's claim for INA § 209(c) relief *nunc pro tunc* would be to insulate him from his own fraudulent conduct in obtaining his adjustment of status by providing false statements on his Form I-485 application. It is well-settled that INA § 209(c) relief is not meant to improperly insulate him from his misconduct which occurred many years after his arrival as a refugee, or from an otherwise applicable removal statute such as INA § 237(a)(1)(A). *Robleto-Pastora v. Holder,* 591 F.3d . at 1060 (citing *Gutnik v. Gonzales,* 469 F.3d 683, 689 (7th Cir.2006) (quotations omitted); *Kaganovich v. Gonzales,*

470 F.3d 894, 898 (9th Cir.2006); and *Matter of Smriko*, 23 I&N Dec. 836 (BIA 2005)). To permit the respondent to use 209(c) relief *nunc pro tunc* would be to circumvent the legitimate consequences that may result from his material misrepresentations and fraudulent conduct, as contemplated by Congressional enactment of INA §§ 237(a)(1)(A) and 212(a)(6)(C)(i) which are clearly implicated in this case. The respondent had an opportunity to seek a waiver under section 209(c) at the time he sought adjustment of status before the USCIS in 2011, but not after he successfully became a lawful permanent resident and his fraudulent conduct came to light in these removal proceedings. *Cf. Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013) (INA § 212(h) waiver not available on a "stand-alone" basis to alien in removal proceedings without a concurrently filed application for adjustment of status, and waiver may not be granted *nunc pro tunc* to avoid requirement for alien to establish eligibility for adjustment).

When there is evidence that an alien may be statutorily barred from relief, the alien has the burden to prove by a preponderance of the evidence that such bar does not apply. 8 C.F.R. § 1240.8(d); *Salem v. Holder*, 647 F.3d 111, 115 (4th Cir. 2011). The Court finds that the respondent has not met his burden to show he is not statutorily barred from the relief he seeks. *Saintha v. Mukasey*, 516 F.3d at 253; *Matter of C-J-H-*, 26 I&N Dec. at 287. The Court concludes that the respondent's request for a waiver under INA § 209(c) must be denied.

V. Conclusion

For the reasons set forth above, the Court finds that the respondent is removable under INA § 237(a)(1)(A) as charged, and is statutorily ineligible for a waiver of inadmissibility under INA § 209(c). Because the Court finds that the respondent is statutorily ineligible for relief, the Court need not determine whether he would merit any relief as a matter of discretion. Accordingly, the Court enters the following:

ORDERS

IT IS HEREBY ORDERED that Respondent is removable from the United States as charged in the Notice to Appear issued on September 12, 2013, as amended on April 9, 2014.

IT IS FURTHER ORDERED that Respondent's application for a waiver of inadmissibility under INA § 209(c) is DENIED.

IT IS FURTHER ORDERED that Respondent be REMOVED from the United States to the designated country of Pakistan.

12/15/2014

Date

V. Stuart Couch

V. STUART COUCH
United States Immigration Judge
Charlotte, North Carolina

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Director

5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

Director

429 7993

July 18, 2019

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL pkt for JAR 8.1.19

FROM: James R. McHenry III
Director sig for JRM

SUBJECT: Candidate for an Appellate Immigration Judge Position

PURPOSE: To refer to the Attorney General for his consideration the paperwork to appoint a current immigration judge (IJ) that is a candidate to an open appellate immigration judge (AIJ) position located at the Falls Church, Virginia, headquarters of the Board of Immigration Appeals (BIA).

TIMETABLE: At the Attorney General's earliest convenience.

DISCUSSION: The BIA is the Executive Office for Immigration Review's (EOIR) appellate component, having nationwide jurisdiction to hear appeals from decisions rendered by IJs and certain decisions by district directors of the Department of Homeland Security. By regulation the BIA has 21 AIJs. It currently has 15 AIJs and six vacancies.

In accordance with the AIJ (also known as Board Member) hiring procedures established on March 8, 2019, a three-member Finalist Panel (Panel) recently convened to evaluate the candidates recommended by EOIR to fill a current Board Member vacancy.

EOIR recommended multiple candidates to the Panel for the vacancy. The Panel reviewed the applicants' written materials and summaries of their interviews conducted by EOIR. The Panel then conducted its own interviews of the candidates for the vacancy. Finally, the Panel discussed the merits of the candidates and agreed to recommend the below listed individual for a vacancy.

The EOIR Director then consulted with the Office of the Deputy Attorney General and the Office of the Attorney General about each recommended candidate. Following these procedures and per the authority delegated by the Attorney General, the EOIR Director determined that IJ Vernon Stuart Couch should be appointed for an AIJ position to be located at the Falls Church, Virginia, headquarters of the BIA. Notwithstanding the delegation of authority to the EOIR Director, the Attorney General retains discretion over the final selection and appointment of candidates.[1]

On June 8, 2010, then Attorney General Eric H. Holder, Jr. tentatively selected Vernon Stuart Couch to serve as an IJ. On September 24, 2010, he was appointed as an IJ, not to exceed 18 months, pending a background investigation. Judge Couch entered on duty under a temporary appointment order on October 24, 2010, and on February 22, 2012, then Attorney General Holder permanently appointed him. (*See* Workflows 1856599, 1938075, and 2457110.) During his time as an IJ, he has performed in an exemplary manner. The candidate has a completed and favorably adjudicated background investigation, and there is no derogatory information that would preclude him from being appointed as the eighteenth AIJ on the BIA, filling a new position established in February 2018. A copy of the candidate's application file is immediately available upon your request.

Judge Couch presents as an excellent candidate for an AIJ position. He is currently an IJ with nine years of experience in immigration law, prior to which he served as, among other things, a senior appellate judge with the United States Navy-Marine Corps Court of Criminal Appeals. Judge Couch has a strong background of immigration knowledge as well as experience serving on an appellate tribunal. His interviews denote a candidate well-qualified to serve as an AIJ. EOIR interview officials stated that Judge Couch "demonstrated a thoughtful approach to balancing fairness and efficiency, describing a number of techniques he has adopted to move cases more quickly, while also balancing due process."

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[1] Previously, if a current IJ was recommended to become a Board Member, per Departmental guidance it was EOIR practice to put forth first a temporary appointment order establishing a new probationary period, followed by a permanent order upon successful completion of the probationary period. While this remains the practice for non-IJ candidates, for sitting IJs, the Office of Legal Counsel has advised, and the Office of the Deputy Attorney General has concurred, that an incumbent IJ converting to an AIJ position requires the same or similar skills and, therefore, should not be placed on a new not-to-exceeds appointment. Therefore, this candidate, having completed his probationary period as an IJ, will be placed on a permanent appointment.

From 2009 to 2010, Judge Couch served as of counsel at the law firm Poyner Spruill, L.L.P., where he focused on professional liability defense, white collar criminal defense, government and corporate investigations, and appellate law.

Judge Couch served as a military attorney in a variety of capacities from 1996 to 1999, and from 2001 to 2009, with his final posting as a senior appellate judge with the United States Navy-Marine Corps Court of Criminal Appeals from 2006 to 2009. In this role, he was the senior judge on a three judge panel responsible for mandatory review of all courts-martial of members of the Naval Service pursuant to certain Articles of the Uniform Code of Military Justice, and review of all petitions for extraordinary relief. Judge Couch served as the senior judge of the National Security Panel to review cases involving classified information and espionage and, upon his retirement from active duty, was awarded the Legion of Merit.

Judge Couch also served as a senior prosecutor in the Office of Military Commissions from 2003 to 2006; military justice officer/chief trial counsel with the Legal Service Support Section from 2001 to 2003; trial counsel for the United States Marine Corps Forces, Atlantic, from 1998 to 1999; and chief trial counsel for the Joint Law Center, Marine Corps Air Station from 1996 to 1998. He also has additional private practice and state litigation experience, having served as an assistant district attorney for the 3B Prosecutorial District of North Carolina, from 2000 to 2001, and as an associate in the Litigation Section of the firm Ward and Smith, P.A., from 1999 to 2000. All of these experiences—as a government attorney, a private-practice attorney, an appellate judge, and an immigration judge—combine to make Judge Couch a well-rounded and extremely well-qualified candidate to address cases at the BIA.

Judge Couch holds a Bachelor of Arts degree from Duke University, Durham, North Carolina; a Juris Doctor from Campbell University, Buies Creek, North Carolina; and a Master of Laws from the George Washington University Law School, Washington, District of Columbia.

Judge Couch's current federal service was vetted and no negative information that would preclude his appointment as an AIJ was reported.

Judge Couch's selection for this AIJ position was made in accordance with the IJ hiring procedures approved by the Attorney General.

An Attorney General Order, appointing Vernon Stuart Couch as an AIJ, is attached hereto for signature.

RECOMMENDATION: That the Attorney General sign the attached order.

APPROVE: _____

Date: August 14, 2019

Concurring components:

OLC SE 7-30-19

DISAPPROVE: _____

Nonconcurring components:

None

OTHER: _____

Attachment

Office of the Attorney General
Washington, D. C. 20530

ORDER NO. 4511-2019

APPOINTING VERNON STUART COUCH AS AN APPELLATE IMMIGRATION JUDGE

By the authority vested in me as the Attorney General by 8 U.S.C. § 1103(g)(1), I hereby appoint Vernon Stuart Couch as an Appellate Immigration Judge.

This order shall be effective on the first day of the pay period in which the oath of office is taken.

8/14/2019
Date

William P. Barr
Attorney General